SUPREME COURT OF QUEENSLAND

CITATION:	*Donovan v TIC Realty Pty Ltd* [2011] QCA 90
PARTIES:	**PAUL RICHARD DONOVAN** (applicant) v **TIC REALTY PTY LTD** ACN 084 801 418 (respondent)
FILE NO/S:	Appeal No 13035 of 2010 DC No 2100 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2011
JUDGES:	Margaret McMurdo P and Chesterman JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs**
CATCHWORDS:	GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – CONSTRUCTION AND EFFECT – GENERALLY – where the applicant entered into a contract with the respondent for the appointment of a real estate agent – where the contract referred to a number of annexures that dealt with commission and other special conditions – where the contract included a guarantee signed by the applicant – where the applicant argued that the applicant's guarantee was limited to the payment of commission in the event that the respondent found a purchaser who completed a contract to buy land from it – where the applicant argued that the special conditions within the agreement made the contract an unintelligible hybrid so that it was impossible to comprehend what obligations the applicant had guaranteed – whether the primary judge erred in finding that there was no ambiguity or uncertainty in the appointment of the real estate agent and the written guarantee EVIDENCE – GENERALLY – CREDIBILITY AND WEIGHT – where the applicant argued that the primary judge erred by admitting documents into evidence that included copies received by facsimile transmission – where

the applicant argued that the 'best evidence rule' made the copies inadmissible in the absence of proof that the original had been destroyed or could not be found – whether the trial judge erred in admitting the documents into evidence

Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424; [2004] HCA 28, cited
Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549; [1987] HCA 15, cited
Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503; [1932] UKHL 2, considered
Masquerade Music Ltd v Springsteen [2001] EWCA Civ 513, considered

Evidence Act 1977 (Qld), s 116
Uniform Civil Procedure Rules 1999 (Qld), r 394

COUNSEL: P Travis for the applicant
R J Anderson, with A R Lonergan, for the respondent

SOLICITORS: Fitz-Walter Lawyers for the applicant
TIC Realty Pty Ltd for the respondent

[1] **MARGARET McMURDO P:** I agree with Chesterman JA's reasons for refusing leave to appeal with costs.

[2] **CHESTERMAN JA:** The respondent, as plaintiff, commenced proceedings in the District Court against a company, Donovan Developments Pty Ltd ("Developments") and the applicant, Mr Donovan, claiming respectively monies owed pursuant to a written agreement for the performance of services by the respondent for the benefit of Developments, and the same amount against the applicant as guarantor of its liability to the respondent. Developments did not defend the proceedings and on 8 July 2010 judgment in default of defence in the sum of $151,064.30 was entered against it. The action against Mr Donovan, the second defendant, proceeded to trial and on 4 November 2010 Judge Samios gave judgment against him for $57,580.84 together with interest of $11,516.17.

[3] The applicant seeks leave to appeal against the judgment. He raises two complaints: one is that the guarantee did not make him answerable for the respondent's claim against Developments but applied with respect to a wholly different transaction and, second, that there was no admissible evidence that he had executed a guarantee.

[4] It is convenient first to deal with the scope of the guarantee which was the major point argued on the application.

[5] The case pleaded by the respondent against Developments and Mr Donovan was that:

> "4 On or about January 2008 through to May 2008, the plaintiff entered into a series of 5, PAMDA forms 22a ("the forms") with the first defendant at the request of the first and second defendants, for the Plaintiff to undertake building marketing work for the first defendant.
>
> …

> 5 The forms provided that the Plaintiff would receive a fee for introducing to the first defendant clients that owned land and required a house to be built by the first defendant on the land.
>
> 6 The agreed fees and charges payable were attached to the forms in an annexure. Payment was to be made in stages with 50% at frame up and 50% at lockup."

[6] At trial the respondent tendered a document the pages of which were sent by facsimile transmission from the applicant acting for himself and Developments on 25 January 2008. Mr Donovan was Developments' only director.

[7] The document was a "PAMD Form 22a" the obligatory form of contract for the appointment of a real estate agent pursuant to the *Property Agents and Motor Dealers Act* 2000. Part 1 of the contract identified the "client" as "Donovan Developments" and the "agent" as the respondent. The "property details" identified five lots of land by lot number and street address. Under Part 4 "Appointment of agent", the contract recited that the client appointed the agent:

> "… to perform the following service/s: ... Sale of: Houses … ."

The appointment was said to be a continuing one for a duration of six months. Under Part 7 "Commission" which required the parties to specify the maximum commission payable in both a dollar amount and percentage of the selling price the form contained the words "Refer Annexure".

"Commission" was said to be payable at settlement.

[8] The form was signed by Mr Donovan on behalf of Developments and by Mr Godfrey on behalf of the respondent.

[9] Included in the facsimile transmission was a document which was entitled:

> "Commission and Fees Calculator
> Annexure to PAMD form22(a)."

It identified the same five lots of land described in Part 3 of the form and set out the commission payable with respect to each lot, the GST payable on each amount of commission and fees and charges for "Referral & Introduction, Marketing, Research and Property Profile Fees" and the GST on those fees. The annexure was signed by Mr Godfrey and Mr Donovan.

[10] A further annexure was also included. It slightly adjusted the fees payable for one of the identified lots. It too was signed by Messrs Godfrey and Donovan.

[11] Importantly the documents which Mr Donovan sent to the respondent included two pages bearing the description:

> "Special Conditions – House Construction
>
> [Land Purchased Under Separate Contract]"

Relevantly the special conditions contained these clauses:

> "1. The Builder and Owner acknowledge that these special conditions form part of the contract and that they apply and

take precedence notwithstanding any provision in the contract to the contrary.

2. Within 21 days from the date Owner's Solicitor receives a fully executed contract, the contract is subject to and conditional upon:
   (a) The Owner obtaining finance … ;
   (b) An inspection of the house plans/drawings to the satisfaction of Owner
3. The Owner … shall have access to the property prior to final payment for the purpose of inspection.
4. 4.1 Where written notice of any minor defect is given … the Builder will remedy the same. …

…

6. The parties acknowledge that a marketing fee is payable to TIC Realty Pty Ltd. This has been agreed by the Builder in the Deed of Agreement with TIC Realty Pty Ltd. The Builder will make payment to TIC Realty Pty Ltd in installments (sic), as follows, where applicable:

Slab pour	~~$~~	
Frame up	$	50%
Roof on	~~$~~	
Lock up	$	50%
Completion	~~$~~	

...

These Special Conditions apply to the agreement for Appointment of Real Estate Agent made between TIC Realty Pty Ltd and Donovan Developments Pty Ltd.

Not withstanding anything else contained in the agreement, the Agent is entitled to and shall be paid commission on the following basis:

1. 50% of the total commission shall be paid to the agent after the builder has received its progress payment under the building contract at the "Frame" stage.
2. The remaining 50% of the commission shall be paid to the agent after the builder has received its progress payment under the building contract being the "Enclosed" progress payment.

To be clear, the builder is not required to pay commission to the agent if the owner of the land defaults in making any of these payments to the builder."

[12] The special conditions bear Mr Donovan's facsimile signature and the date 25 January 2008. Also included in the facsimile transmission was a document entitled:

> "PAMD Form 22a – Queensland
> Director's Guarantee & Indemnity"

This part of the document consisted of two pages containing six lettered paragraphs. Relevantly they were:

> "A. In consideration of TIC Realty Pty Ltd entering into a PAMD Form 22a ("the Form") at the request of the Company, the Directors jointly and severally unconditionally and irrevocably guarantee to TIC Realty Pty Ltd the due and punctual performance by the Company of each of the Company's obligations under the Form.
>
> B. The Directors jointly and severally agree to indemnify TIC Realty Pty Ltd against all losses or claims which may be incurred by it/them as a consequence of any failure by the Company to punctually perform and fulfill (sic) its obligations under the Form.
>
> C. It is hereby expressly agreed and acknowledged that TIC Realty Pty Ltd may exercise its rights against the Directors at any stage after the Company fails to perform its obligations or make payment of monies due under the Form.
>
> D. This guarantee and indemnity is a continuing guarantee and indemnity …
>
> E. The guarantees and indemnities contained herein shall be principal obligations …
>
> F. At the request of the Directors, TIC Realty Pty Ltd is willing to enter into the Form and the Directors acknowledge that TIC Realty Pty Ltd is entering into the Form because of the granting of this guarantee."

[13] There followed in handwriting the name "Paul Richard Donovan" and what appears to be Mr Donovan's signature, the date 25 January 2008, a postal address and the signature of Mr Mark Fitz-Walter, the defendant's solicitor.

[14] The applicant's argument was that:

> "The case … against Mr Donovan was that the respondent was owed fees for introducing land owners to a building company, and that Mr Donovan guaranteed the payment of those fees. … the documents … said to evidence the relevant guarantee … were solely concerned with the payment of commissions … owed by a client to its appointed real estate agent for … the "sale of houses" … . The … respondent … tendered documents that bore no resemblance to the pleaded case. … According to this document, the directors agreed to guarantee the performance by "the Company" of its obligations under the PAMD Form 22a … . The document does not refer to any agreement for building, marketing or introduction fees. … the annexure to the form makes no reference to any instalment payments; instead, the document … specifically stated that the commissions, fees and charges … were to be paid at "settlement" – not at "frame up" and then at "lock up"."

[15] The applicant emphasised that the document sued upon was entitled "Appointment of Real Estate Agent (Sales and Purchases)" and contained a statement that it "enables a person … to appoint a real estate agent … for the sale or purchase of property …", and that by its terms Developments appointed the respondent to sell houses. The form made provision for advertising properties to be sold on a designated website, and nominated a "reserve or listing price" with respect to each lot. The commission on sale was to be payable "at settlement".

[16] The applicant's argument raised two interrelated points. One was that Mr Donovan's guarantee was limited to Developments' obligations to pay commission in the event that the respondent found a purchaser who completed a contract to buy land from it. The respondent's claim was not in respect of non-payment of commission but for non-payment of fees due on an introduction of a land owner who contracted with Developments for the construction of a house. The second aspect was that inclusion of the special conditions within the agreement made the contract an unintelligible hybrid so that it was impossible to comprehend what obligations, (payment of commission on sale, or of an introduction fee for building) if any, Mr Donovan had guaranteed.

[17] In support of the second argument the applicant relied upon the proposition stated in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 affirmed in *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at 433:

> "… the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety. The doctrine of strictissimi juris provides a counterpoise to the law's preference for a construction that reads a provision otherwise than as a condition. A doubt as to the status of a provision in a guarantee should therefore be resolved in favour of the surety."

[18] The applicant's submissions are without substance or merit. Even a momentary examination of the pages on which the parties expressed their agreement reveals Mr Donovan's assumption of his company's liability to pay the marketing or introduction fee to TIC Realty Pty Ltd in the event that the respondent procured a building contract between the owners of the identified lots and Developments. There was no dispute about Developments' obligation to pay the fee in the circumstances described. The applicant's only point was that he had not been shown to have guaranteed the payment of the marketing fee.

[19] The applicant's submissions could only be taken seriously if one ignored altogether the special conditions which the parties took care to include in their contract. Those conditions were signed by Mr Donovan and transmitted by him with the other pages of the contract. The special conditions themselves recited that they formed part of the contract and took precedence "notwithstanding any provision in the contract to the contrary". To make the matter even clearer the special conditions were agreed to apply "to the agreement for Appointment of Real Estate Agent made between TIC Realty Pty Ltd and Donovan Developments Pty Ltd.".

[20] Once one has regard to the terms of the special conditions one finds a promise by Developments to pay a fee to TIC Realty Pty Ltd in two instalments at specified stages of construction. The amount to be paid was set out in the annexure and an amendment to the annexure which the parties included in their contractual papers which Mr Donovan signed.

[21] It is true that the PAMD Form 22a was not particularly suitable for the agreement the parties actually made, and that the agreement sued on was not in its nature a claim for commission on the sale of real property. Nevertheless the parties chose to express their bargain in the Form 22a which they adapted for their own purposes. As long as the bargain appears with sufficient clarity from the form they chose it was binding. The inappropriateness of the form of expression is immaterial if the expression is clear. Lord Wright's remarks in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 514 remain apposite:

> "Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, "*verba ita sunt intelligenda ut res magis valeat quam pereat*"."

The maxim is that words are to be understood so that they can be given effect to.

[22] It goes without saying that the whole of the document in which the parties chose to record their agreement must be read for the purpose of ascertaining their agreement. To ignore the special conditions would offend a cardinal principle of contractual construction. If one reads the special conditions one sees that Developments agreed to pay specified sums of money to the respondent in two different sets of circumstances. One was commission upon the sale of property and the other was a fee for procuring land owners to make a building contract with Developments. When one comprehends this elementary proposition which emerges from the party's own express bargain the guarantee is equally plain. Mr Donovan unconditionally and irrevocably guaranteed to the respondent "the company's obligations under the form." By "the form" is meant the PAMD Form 22a to which the parties expressly added the special conditions so that the company's obligation to pay the fee under the special conditions was an obligation "under the form".

[23] It is true that the guarantee did not itself name "the company" but both the statutory form and the special conditions showed it to be Developments.

[24] The applicant's principal challenge to the judgment cannot be accepted.

[25] The second argument advanced by the applicant is even less meritorious. It is that the primary judge erred by admitting the documents into evidence because they were copies received by facsimile transmission. The point taken is that the original document should have been produced. It was submitted that the "best evidence rule" made the copy inadmissible in the absence of proof that the original had been destroyed or could not be found.

[26] The applicant's point was very narrow. His counsel did not dispute that he had signed the original document copies of which were tendered. Nor did he dispute that the facsimile of his signature which appeared on the tendered documents was in fact a true copy of his signature. The point taken was that the copy could not be received over objection and that only the original would suffice.

[27] The lack of merit in the submission may be understood when one appreciates that it was Mr Donovan who sent the documents to the respondent by facsimile

transmission. The documents which contained his original signature were, at the time, and presumably remained, in his possession.

[28] The continued existence of the "best evidence rule" may, perhaps, be doubted in cases like the present where one is concerned with electronic or photographic reproductions of an original document. The authors of *Phipson on Evidence 16th Ed*, expressed the opinion (7-45 p 182):

> "Thus, it would appear that the best evidence rule has, in civil cases at least, been consigned to the history books."

[29] The opinion was expressed by reference to what was said by Jonathan Parker LJ in *Masquerade Music Ltd v Springsteen* [2001] EWCA Civ 513:

> "… the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired. In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence. Where the party seeking to adduce the secondary evidence could readily produce the document, it may be expected that (absent some special circumstances) the court will decline to admit the secondary evidence … . At the other extreme, where the party seeking to adduce the secondary evidence genuinely cannot produce the document, it may be expected that (absent some special circumstances) the court will admit the secondary evidence and attach such weight to it as it considers appropriate in all the circumstances. In cases falling between those two extremes, it is for the court to make a judgment as to whether in all the circumstances any weight should be attached to the secondary evidence. Thus, the "admissibility" of secondary evidence of the contents of documents is … entirely dependent upon whether or not any weight is to be attached to that evidence … taking into account all the circumstances of the particular case." [85]

[30] The authors of *Cross on Evidence Australian Edition* say more cautiously that the rule is "losing power" (para 1480) and that the *Evidence Acts* "have radically modified it."

[31] It is not necessary to pronounce whether the rule has expired here, or whether it continues to gasp. There were ample means available to the primary judge to avoid its operation in addition to that expressed by Jonathan Parker LJ which, I think, has much to commend it.

[32] The primary judge relied upon *UCPR* 394 which provides that:

> "(1) If a fact in issue is not seriously in dispute or strict proof of a fact in issue might cause unnecessary or unreasonable expense, delay or inconvenience … the court may order that evidence of the fact may be given … in any way the court directs."

The applicant objects that the use of the rule was erroneous because it circumvented the "best evidence rule" which itself is an important guardian of the

rights of parties, and because the "authenticity of documents" was challenged so that strict proof was necessary. The arguments should not be accepted. The rule which has statutory force, clearly empowers a court to depart from the best evidence rule where the circumstances show that course to be appropriate. The rule thus appears to endorse the approach taken by Jonathan Parker LJ in *Springsteen*.

[33] As to the second objection it is not right that the authenticity of the guarantee was in question. There was no denial by pleading or evidence that Mr Donovan had signed the guarantee. He was in the best position to know on what document he had placed his signature. He had the original at the time of execution and did not assert that he had lost possession of it. His objection was of the most trifling and tactical kind. The primary judge was entitled to use *UCPR* 394 as he did.

[34] As well s 116 of the *Evidence Act* 1977 (Qld), in my opinion, made the facsimile copy admissible. The section provides:

> "Notwithstanding any other provision of this part, where a document has been copied by means of a photographic or other machine which produces a facsimile copy of the document, the copy is, upon proof to the satisfaction of the court that the copy was taken or made from the original document by means of the machine, admissible in evidence to the same extent as the original document would be admissible in evidence without:-
>
> (a) proof that the copy was compared with the original document; and
>
> (b) notice to produce the original document having been given."

[35] The document which the respondent received as a result of the applicant's facsimile transmission was itself capable of proving that it was a copy made from the original by means of the facsimile machine. It was therefore admissible "to the same extent as the original document …".

[36] The applicant has not demonstrated any ground for thinking that the primary judgment was wrong or was affected by any error. An appeal, should leave to appeal be granted, would have no prospect of success. Accordingly the application for leave to appeal should be refused with costs.

[37] **ATKINSON J:** I agree with the reasons for judgment of Chesterman JA and the order proposed by his Honour.